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DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

7 CFR Part 966

[Doc. No. AMS-FV-11-0080; FV11-966-1 FR]

Tomatoes Grown in Florida; Increased Assessment Rate

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Final rule.

SUMMARY: This rule increases the assessment rate established for the Florida Tomato Committee (Committee) for the 2011-12 and subsequent fiscal periods from \$0.0275 to \$0.037 per 25-pound carton of tomatoes handled. The Committee locally administers the marketing order which regulates the handling of tomatoes grown in Florida. Assessments upon tomato handlers are used by the Committee to fund reasonable and necessary expenses of the program. The fiscal period begins August 1 and ends July 31. The assessment rate will remain in effect indefinitely unless modified, suspended, or terminated.

EFFECTIVE DATE: [INSERT DATE 1 DAY AFTER THE DATE OF PUBLICATION IN THE FEDERAL REGISTER].

FOR FURTHER INFORMATION CONTACT: Doris Jamieson, Marketing Specialist, or Christian D. Nissen, Regional Director, Southeast Marketing Field Office, Marketing Order and

Agreement Division, Fruit and Vegetable Program, AMS, USDA;
Telephone: (863) 324-3375, Fax: (863) 325-8793, or E-mail:
Doris.Jamieson@ams.usda.gov or
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Small businesses may request information on complying with this regulation by contacting Laurel May, Marketing Order and Agreement Division, Fruit and Vegetable Program, AMS, USDA, 1400 Independence Avenue SW, STOP 0237, Washington, DC 20250-0237; Telephone: (202) 720-2491, Fax: (202) 720-8938, or E-mail: Laurel.May@ams.usda.gov.

SUPPLEMENTARY INFORMATION: This rule is issued under Marketing Agreement No. 125 and Order No. 966, both as amended (7 CFR part 966), regulating the handling of tomatoes grown in Florida, hereinafter referred to as the "order." The order is effective under the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601-674), hereinafter referred to as the "Act."

The Department of Agriculture (USDA) is issuing this rule in conformance with Executive Order 12866.

This rule has been reviewed under Executive Order 12988, Civil Justice Reform. Under the marketing order now in effect, Florida tomato handlers are subject to assessments. Funds to administer the order are derived

from such assessments. It is intended that the assessment rate as issued herein will be applicable to all assessable tomatoes beginning August 1, 2011, and continue until amended, suspended, or terminated.

The Act provides that administrative proceedings must be exhausted before parties may file suit in court. Under section 608c(15)(A) of the Act, any handler subject to an order may file with USDA a petition stating that the order, any provision of the order, or any obligation imposed in connection with the order is not in accordance with law and request a modification of the order or to be exempted therefrom. Such handler is afforded the opportunity for a hearing on the petition. After the hearing, USDA would rule on the petition. The Act provides that the district court of the United States in any district in which the handler is an inhabitant, or has his or her principal place of business, has jurisdiction to review USDA's ruling on the petition, provided an action is filed not later than 20 days after the date of the entry of the ruling.

This rule increases the assessment rate established for the Committee for the 2011-12 and subsequent fiscal periods from \$0.0275 to \$0.037 per 25-pound carton of tomatoes.

The Florida tomato marketing order provides authority for the Committee, with the approval of USDA, to formulate an annual budget of expenses and collect assessments from handlers to administer the program. The members of the Committee are producers of Florida tomatoes. They are familiar with the Committee's needs and with the costs for goods and services in their local area and are thus in a position to formulate an appropriate budget and assessment rate. The assessment rate is formulated and discussed in a public meeting. Thus, all directly affected persons have an opportunity to participate and provide input.

For the 2009-10 and subsequent fiscal periods, the Committee recommended, and USDA approved, an assessment rate that would continue in effect from fiscal period to fiscal period unless modified, suspended, or terminated by USDA upon recommendation and information submitted by the Committee or other information available to USDA.

The Committee met on August 23, 2011, and unanimously recommended 2011-12 expenditures of \$1,496,452 and an assessment rate of \$0.037 per 25-pound carton of tomatoes. In comparison, last year's budgeted expenditures were \$1,496,971. The assessment rate of \$0.037 is \$0.0095 higher than the rate currently in effect.

The Committee estimates the 2011-2012 crop to be approximately 35 million 25-pound cartons, down from the 45 million cartons estimated for last year. At the current assessment rate, assessment income would equal only \$962,500, an amount insufficient to cover the Committee's anticipated expenditures. Therefore, the Committee voted to increase the assessment rate in order to generate sufficient funds to meet Committee expenses.

The major expenditures recommended by the Committee for the 2011-12 year include \$575,000 for education and promotion, \$436,372 for salaries, \$250,000 for research, and \$64,000 for office space. Budgeted expenses for these items in 2010-11 were \$535,500, \$436,372, \$250,000, and \$62,283, respectively.

The assessment rate recommended by the Committee was derived by dividing anticipated expenses by expected shipments of Florida tomatoes. Tomato shipments for the year are estimated at 35 million 25-pound cartons which should provide \$1,295,000 in assessment income. Income derived from handler assessments, along with interest income, USDA Market Access Program (MAP) funds, and funds from the Committee's authorized reserve, should be adequate to cover budgeted expenses. Funds in the reserve

(approximately \$200,000) will be kept within the maximum permitted by the order of not to exceed one fiscal period's expenses as stated in § 966.44.

The assessment rate established in this rule will continue in effect indefinitely unless modified, suspended, or terminated by USDA upon recommendation and information submitted by the Committee or other available information.

Although this assessment rate will be in effect for an indefinite period, the Committee will continue to meet prior to or during each fiscal period to recommend a budget of expenses and consider recommendations for modification of the assessment rate. The dates and times of Committee meetings are available from the Committee or USDA.

Committee meetings are open to the public and interested persons may express their views at these meetings. USDA will evaluate Committee recommendations and other available information to determine whether modification of the assessment rate is needed. Further rulemaking will be undertaken as necessary. The Committee's 2011-12 budget and those for subsequent fiscal periods would be reviewed and, as appropriate, approved by USDA.

Final Regulatory Flexibility Analysis

Pursuant to requirements set forth in the Regulatory Flexibility Act (RFA) (5 U.S.C. 601-612), the Agricultural Marketing Service (AMS) has considered the economic impact of this rule on small entities. Accordingly, AMS has prepared this final regulatory flexibility analysis.

The purpose of the RFA is to fit regulatory actions to the scale of business subject to such actions in order that small businesses will not be unduly or disproportionately burdened. Marketing orders issued pursuant to the Act, and the rules issued thereunder, are unique in that they are brought about through group action of essentially small entities acting on their own behalf.

There are approximately 100 producers of tomatoes in the production area and approximately 80 handlers subject to regulation under the marketing order. Small agricultural producers are defined by the Small Business Administration (SBA) as those having annual receipts less than \$750,000, and small agricultural service firms are defined as those whose annual receipts are less than \$7,000,000 (13 CFR 121.201).

Based on industry and Committee data, the average annual price for fresh Florida tomatoes during the 2010-11 season was approximately \$13.88 per 25-pound container, and

total fresh shipments for the 2010-11 season were 36,100,637 25-pound cartons of tomatoes. Committee data indicates that approximately 21 percent of the handlers handle 90 percent of the total volume shipped. Based on the average price, about 80 percent of handlers could be considered small businesses under SBA's definition. In addition, based on production data, grower prices as reported by the National Agricultural Statistics Service, and the total number of Florida tomato growers, the average annual grower revenue is below \$750,000. Thus, the majority of handlers and producers of Florida tomatoes may be classified as small entities.

This rule increases the assessment rate established for the Committee and collected from handlers for the 2011-12 and subsequent fiscal periods from \$0.0275 to \$0.037 per 25-pound carton of tomatoes. The Committee unanimously recommended 2011-12 expenditures of \$1,496,452 and an assessment rate of \$0.037 per 25-pound carton of tomatoes. The assessment rate of \$0.037 is \$0.0095 higher than the 2010-11 rate. The quantity of assessable tomatoes for the 2011-12 season is estimated at 35 million cartons. Thus, the \$0.037 rate should provide \$1,295,000 in assessment income. Income derived from handler assessments, along

with interest income, MAP funds, and funds from the Committee's authorized reserve fund, should be adequate to meet this year's expenses.

The major expenditures recommended by the Committee for the 2011-12 year include \$575,000 for Education and Promotion, \$436,372 for salaries, \$250,000 for research, and \$64,000 for office space. Budgeted expenses for these items in 2010-11 were \$535,500, \$436,372, \$250,000, and \$62,283, respectively.

The Committee estimates the 2011-12 crop to be approximately 35 million 25-pound cartons, down from the 45 million cartons estimated for last year. At the current assessment rate, assessment income would equal only \$962,500, an amount insufficient to cover the Committee's anticipated expenditures. Therefore, the Committee voted to increase the assessment rate in order to generate sufficient funds to meet Committee expenses.

The Committee reviewed and unanimously recommended 2011-12 expenditures of \$1,496,452. Prior to arriving at this budget, the Committee considered information from various sources, such as the Committee's Executive Subcommittee, Finance Subcommittee, and Education and Promotion Subcommittee. Alternative expenditure levels

were discussed by these groups, based upon the relative value of various education and promotion projects to the tomato industry. The assessment rate of \$0.037 per 25-pound carton of assessable tomatoes was then determined by dividing the total recommended budget by the quantity of assessable tomatoes, estimated at 35 million 25-pound cartons for the 2011-12 year. The increased assessment rate should provide \$1,295,000 in assessment income. This is approximately \$201,452 below the anticipated expenses, which the Committee determined to be acceptable.

A review of historical information and preliminary information pertaining to the upcoming crop year indicates that the grower price for the 2011-12 season could range between \$32.80 and \$4.83 per 25-pound carton of tomatoes. Therefore, the estimated assessment revenue for the 2011-12 crop year as a percentage of total grower revenue could range between .1 and .8 percent.

This action increases the assessment obligation imposed on handlers. While assessments impose some additional costs on handlers, the costs are minimal and uniform on all handlers. Some of the additional costs may be passed on to producers. However, these costs are offset by the benefits derived by the operation of the marketing

order. In addition, the Committee's meeting was widely publicized throughout the Florida tomato industry and all interested persons were invited to attend the meeting and participate in Committee deliberations on all issues. Like all Committee meetings, the August 23, 2011, meeting was a public meeting and all entities, both large and small, were able to express views on this issue.

In accordance with the Paperwork Reduction Act of 1995, (44 U.S.C. Chapter 35), the order's information collection requirements have been previously approved by the Office of Management and Budget (OMB) and assigned OMB No. 0581-0178 Vegetable and Specialty Crops. No changes in those requirements as a result of this action are necessary. Should any changes become necessary, they would be submitted to OMB for approval.

This rule imposes no additional reporting or recordkeeping requirements on either small or large Florida tomato handlers. As with all Federal marketing order programs, reports and forms are periodically reviewed to reduce information requirements and duplication by industry and public sector agencies. As noted in the initial regulatory flexibility analysis, USDA has not identified

any relevant Federal rules that duplicate, overlap, or conflict with this final rule.

AMS is committed to complying with the E-Government Act, to promote the use of the Internet and other information technologies to provide increased opportunities for citizen access to Government information and services, and for other purposes.

A proposed rule concerning this action was published in the **Federal Register** on April 10, 2012 (77 FR 21492). Copies of the proposed rule were also mailed or sent via facsimile to all tomato handlers. Finally, the proposal was made available through the Internet by USDA and the Office of the Federal Register. A 15-day comment period ending April 25, 2012, was provided for interested persons to respond to the proposal. Three comments were received in support of the proposal. One commenter stated that he initially had concerns regarding the increase in the assessment rate. However, after reviewing the Committee's budget of expenditures and noting that the increase is paid uniformly among all handlers, he stated the increase was necessary and fairly distributed. Another commenter noted that the increase is necessary due to the rising prices of goods and services and is only proposed to cover budgeted

expenses. Another commenter stated the increase would improve the income for local farmers.

Accordingly, no changes will be made to the rule as proposed, based on the comments received.

A small business guide on complying with fruit, vegetable, and specialty crop marketing agreements and orders may be viewed at:
www.ams.usda.gov/MarketingOrdersSmallBusinessGuide. Any questions about the compliance guide should be sent to Laurel May at the previously mentioned address in the **FOR FURTHER INFORMATION CONTACT** section.

After consideration of all relevant material presented, including the information and recommendation submitted by the Committee and other available information, it is hereby found that this rule, as hereinafter set forth, will tend to effectuate the declared policy of the Act.

Pursuant to 5 U.S.C. 553, it also found and determined that good cause exists for not postponing the effective date of this rule until 30 days after publication in the **Federal Register** because handlers are already receiving 2011-12 crop tomatoes from growers; the marketing order requires that the rate of assessment for each fiscal period

apply to all assessable tomatoes handled during such period; and, the Committee needs to have sufficient funds to pay its expenses which are incurred on a continuous basis. Further, handlers are aware of this rule which was recommended at a public meeting. Also, a 15-day comment period was provided for in the proposed rule.

List of Subjects in 7 CFR Part 966

Marketing agreements, Reporting and recordkeeping requirements, Tomatoes.

For the reasons set forth in the preamble, 7 CFR part 966 is amended as follows:

PART 966 - TOMATOES GROWN IN FLORIDA

1. The authority citation for 7 CFR part 966 continues to read as follows:

Authority: 7 U.S.C. 601-674.

2. Section 966.234 is revised to read as follows:
§ 966.234 Assessment rate.

On and after August 1, 2011, an assessment rate of \$0.037 per 25-pound carton is established for Florida tomatoes.

Dated: July 20, 2012

David R. Shipman
Administrator
Agricultural Marketing Service

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